National Broadcasting Company, Inc. *and* American Federation of Television and Radio Artists, AFL–CIO. Case 2–CA–26432

September 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On November 21, 1994, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Broadcasting Company, Inc., New York City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[4]

1. Substitute the following for paragraph 2(a).

''(a) Furnish to the Union all information requested by it in its letter of October 22, 1992, with the exception of sections I, II(B) through (D), II(G), and II(J) of its letter.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the resolutions.

The Respondent has excepted, inter alia, to the judge's failure to credit certain of its witnesses' testimony that Union Representative York had conceded during negotiations for successor agreements that the Union did not represent the newspersons employed by the subsidiaries at issue. We conclude that the judge's finding that the Union did not waive its right to pursue any contractual claim was based on his implicitly discrediting the testimony of the Respondent's witnesses and implicitly crediting the testimony of the General Counsel's witness, York, that he withdrew his proposed clarification of the scope of the agreements without prejudice to the Union's right to pursue elsewhere its claim regarding coverage.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by refusing to provide the Union with the requested information, we note that the Respondent did not raise, in its answer, the defense that furnishing the information would be burdensome, but instead argued that the burdensomeness of the request evidenced the Union's bad faith. In any event, we find that the Respondent has not demonstrated the burdensomeness of the request.

[3] Certain sections of the information request were specifically excluded from the scope of the complaint allegations, as amended at the hearing. Thus, we do not find that the Respondent unlawfully refused to furnish the Union with the information sought in secs. I, II(B) through (D), II(G), and II(J) of its information request. We shall modify the judge's order accordingly. We shall also correct the judge's inadvertent finding that the Union's request was dated October 2, rather than the correct date of October 22, 1992, the date set forth in the amended complaint.

[4] To the extent that the Respondent has since furnished information, that information need not be refurnished. Those matters can be determined in the compliance stage.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to honor requests by the American Federation of Television and Radio Artists, AFL–CIO for information necessary and relevant to its performance of its responsibilities in representing our employees for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union all information it requested on October 22, 1992, as to our parent company and as to CNBC, NBC News Channel, and Nightside with the exception of sections I, II (B) through (D), II (G) and II (J) of the Union's request.

NATIONAL BROADCASTING COMPANY, INC.

Rhonda Gottlieb, Esq., for the General Counsel.
Bernard D. Gold, Esq. (Proskauer, Rose, Goetz & Mendelsohn), of New York, New York, for the Respondent.
Susan J. Panepento, Esq. (Cohen, Weiss & Simon), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint, as amended at the hearing, alleges that National Broadcasting Company, Inc. (the Respondent) has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). In particular, it alleges that the Respondent has failed to give the American Federation of Television and Radio Artists, AFL–CIO (the Union) information the Union requested and

that allegedly is needed by it in order to fulfill its responsibilities as the collective-bargaining representative of certain units of employees of the Respondent. The Respondent's answer denies the relevancy of the information sought and asserts that the task of honoring the request is unduly costly and burdensome.

I heard this case in New York City on June 15, 16, and 17, 1994. On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent operates a television broadcasting network and, in its operations annually, it meets the Board's standard for asserting jurisdiction. The Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

1. The Respondent's facilities and the units of employees represented by the Union

The Respondent is a corporation that is wholly owned by the General Electric Company. Its principal office is in New York City.

For many years, the Union has represented newspersons, including reporters, correspondents, anchors, and analysts in two separate units, described more fully below. These employees are assigned to gather, prepare, write, edit, and report news accounts. There are two categories of newspersons, staff and nonstaff. Staff newspersons are regular employees; they receive fringe benefits. Nonstaff newspersons are freelancers who do not receive fringe benefits. The Union and the Respondent have separate contracts for these two groups[2] but, for purposes of this case, the relevant contract provisions of those contracts are the same for both groups.

The staff newspersons contract provides in pertinent part:

> This Agreement is applicable to staff newspersons, as defined herein, including reporters, correspondents, commentators and analysts, employed by the [Respondent] in New York, Washington, Chicago or Los Angeles, or in a domestic network news bureau, or who are sent by the [Respondent] from any of such cities (a) on a temporary assignment to another location within the United States, or (b) to a location outside the United States for less than one year. The term ''staff newspersons'' as used in this agreement means an individual regularly employed by the [Respondent] on a staff basis and/or an individual contract basis, where in any such case the [Respondent] has the right to assign such persons to such persons the duties set forth in Article II below, if such employment is for the principal purpose of delivering news on-the-air on network television or inserts therefor. Such assignments may include assignments to film and tape television documentary programs.
>
> This Agreement shall not be construed as being applicable to persons who do not meet the definition of staff newspersons set forth above, e.g., individuals employed as sportscasters or sports reporters, weatherpersons, critics, etc., and persons employed on a freelance basis for one or more specific programs or program series . . . [the Respondent] recognizes [the Union] as the exclusive collective bargaining agent for the employees in the national bargaining unit described above . . . .

The nonstaffpersons' contract, referred to by the parties as the code, applies to freelance newspersons at the same facilities to which the staff contract applies and with the same limitations as discussed below.

Article IV of the staff contract provides for limitations of coverage as follows:

> This Agreement is not applicable to staff newspersons whose regular place of employment is in a city, other than New York, Washington, Chicago and Los Angeles, in which the [Respondent] owns a station. Except as otherwise provided in Article I thereof, staff newspersons working outside the United States are not covered by this Agreement . . . .
>
> Employees at the [Respondent's] domestic network news bureaus who are engaged primarily in managerial or administrative duties shall be covered only for their on-the-air performances (excluding editorial) and, for such performances, only by the free provisions of this Agreement.

As noted here, the agreement does not define the term, domestic network news bureau; the Respondent and the Union have different positions as to its application. The agreement also contains a provision for compensating a unit employee whose story is used on cable television.

2. The facilities for which information was sought

The Union, as discussed further below, sought information about the operations by the Respondent of three entities—CNBC, NBC News Channel, and Nightside, and as to its parent company.

CNBC, the abbreviated name for Consumer News and Business Channel, began operations on April 17, 1989. It is a subsidiary of NBC Cable, which itself is a subsidiary of the Respondent. CNBC is a television cable station operating out of Fort Lee, New Jersey. It is a ''basic'' cable service, i.e., one for which a subscriber to a cable company is not charged extra as one would for a ''premium'' channel.

NBC News Channel is a wholly owned subsidiary of NBC News, one of the Respondent's divisions. It operates from a building owned by an NBC affiliated station located in Charlotte, North Carolina, where it gathers news stories from across the country and make them available to NBC-owned stations, to NBC affiliates, and to other subscribers.

Nightside is a news program produced by NBC News Channel. It began production on November 4, 1991, and is broadcast over NBC stations in the very early morning hours.

[1] The Respondent's motion to correct the transcript is granted. It is made part of the record as ALJ Exh. 2.

[2] The contracts also cover categories of employees other than newspersons.

B. *The Events Leading Up to the Union's Request*

Since the late 1970's the Union had asked the Respondent without success to recognize it as the representative of newspersons the Respondent may employ in a cable service. The Union did succeed, in 1979, in getting the Respondent to add San Francisco to the areas covered by the agreement.

In October 1991 at the outset of the industrywide negotiations for the agreements referred to above, the Union's representative, Bruce York, stated that changes have taken place as to the gathering and reporting of news on the air, citing NBC News Channel as an instance when work may be moving from New York to North Carolina. He asked questions then, e.g., whether an employee in New York whose story was used by NBC News Channel would receive a fee therefor. He wanted to find out via those questions how the changes were affecting unit employees and the unit itself. His inquiries were based on reports he received. These included an article published early in 1991 in that News Channel's president referred to News Channel as NBC News' plan to improve and to expand and that reported that ''[u]ntil now, the network has been funding its local affiliates from New York.'' Also included were a report that the Respondent had temporarily transferred two unit employees, news anchors, to the Nightside program and that two other unit employees had made contributions to that program. A later document issued by the Respondent to its newspersons read in pertinent part, ''NBC News and the 210 NBC stations truly are partners—the relationship is such that you could say that we have 210 bureaus, that the affiliates have a high newsgathering business in New York and throughout the world.''

One point over which there is no dispute is that television news programming is at an ''evolving'' stage.

In June 1992, York expressed to the Respondent concern as to its operating NBC News Channel outside the scope of its contracts. The Respondent told him then that it had its counsel prepare a lengthy opinion on that matter and that it had to get clearance from its parent, General Electric before it could grant the Union recognition for that operation. York was told that the Respondent's main concern was with another union. Later, the Respondent informed York that recognition could not be granted.

C. *The Union's Request and Response Thereto*

On October 2, 1992, the Union sent to the Respondent 33 pages of questions. The first six pages asked for data as to the extent to which General Electric Company controlled the operations of the Respondent, CNBC, NBC News Channel, and Nightside. The remaining 27 pages sought information as to the structure and management respectively of CNBC, NBC News Channel, and Nightside, as to employee interchange among these entities, as to job classifications, as to integration of operations and related matters. York testified, in substance, that the Union needed all this information in order to determine whether, and to what extent, there was substance to his belief that unit work was eroding because of the changes being implemented by the Respondent and to his belief also that unit employees may not be receiving compensation, as called for in the agreements, for their stories when used by CNBC and NBC News Channel.

York wrote the Respondent on January 16, 1993, stating that he had received no reply to his October 2, 1992 letter. On March 1, 1993, the Respondent replied, stating that it appeared to have no obligation to comply with the request as it was a ''fishing expedition'' and as the Union had withdrawn from its earlier efforts to have the Respondent recognize it as bargaining agent for newspersons in the employ of CNBC, NBC News Channel, and Nightside. The Respondent therein asked the Union to point out to it how each particular item it requested related specifically to any particular contract provision. It stated that on receipt of those particulars, it would decide ''what, if any'' of the requested data the Union was entitled to be given.

The Union wrote back that its request was properly framed and that the information sought was needed by it in order for it to administer its contracts. It stated that it had no choice but to file an unfair labor practice charge. It did so 3 days later.

York testified that, subsequent to the Union's request of October 2, he saw a memorandum issued by NBC News that instructed correspondents on the Nightside program to sign off by saying that they are ''reporting for NBC News'' and that they are to do this so that their accounts could be rebroadcast. Other documents of the Respondent observed that CNBC was ''evolving'' as to its format, that CNBC's logo was being redone to resemble the Respondent's and that some CNBC programs were beginning to resemble those produced by the Respondent for its affiliates.

The Respondent proffered testimony that CNBC is primarily a cable service, asserting that 1 percent of its news is made available for use on a network basis. It contends that the language of the staff contract thereby excluded CNBC from its coverage. The General Counsel contends that a bona fide question may exist as to whether CNBC and NBC News Channel newspersons are employees of ''domestic network news bureaus.'' The Respondent maintains that that is not how CNBC or NBC News Channel operates. The Union argues that CNBC may well be bound under its contracts with the Respondent as it is located in Fort Lee, New Jersey, just across the Hudson River from New York City, on the ground that it is thus located in the New York metropolitan area. The Respondent placed in evidence an arbitration award in which a similar claim was made by the Union against the Columbia Broadcasting System and that was rejected. The Respondent asserts that that award disposes of that aspect of the Union's reasons for seeking data about CNBC.

D. *Analysis*

1. Relevance

The Respondent contends that the Union's request was made in bad faith in that the information it asked for can have no possible relevance to the Union's ability to service its contracts covering staff news persons and nonstaff news persons. In support thereof, the Respondent notes that the Union had, in prior years, asked in vain for recognition as bargaining agent for newspersons in any cable service that Respondent might establish. It asserts that the description of the unit as set forth in the agreements and the testimony in this case demonstrate the irrelevance of the data sought.

The General Counsel and the Union assert that these defenses by the Respondent are matters that an arbitrator may

consider but cannot serve as a basis to relieve the Respondent of its obligation to furnish the requested information.

The legal principles pertaining to the issue of relevance were set out in Judge Pollack's decision in *Barnard Engineering Co*., 282 NLRB 617, 619 (1987), excerpted below. See also *Somerville Mills*, 308 NLRB 425, 440 (1992).

It is well settled that an employer has a statutory obligation to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a ''probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., supra at 437. The Supreme Court has characterized the standard to be applied in determining the union's right to information as ''a broad discovery type standard,'' permitting the union access to a broad scope of information potentially useful for the purpose of effectuating the bargaining process. *NLRB v. Acme Industrial*, supra at 437 and fn. 6.

The Union's right to relevant information is not limited to the period during that the employer and the union are engaged in negotiations for a collective-bargaining agreement. The Union is equally entitled to relevant information during the contract's term, in order to evaluate or process grievances and to take whatever other bona fide actions are necessary to administer the collective-bargaining agreement. *Electrical Workers v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980); *J.I. Case Co. v. NLRB*, 253 F.2d 149, 153 (7th Cir. 1958). The failure of either an employer or a union to give the other information necessary to enable the requesting partly intelligently to evaluate its contract rights may constitute an unfair labor practice. *NLRB v. Safeway Stores*, 622 F.2d 425, 429 (9th Cir. 1980), cert. denied 450 U.S. 913 (1981). When the union's request deals with information pertaining to employees in the unit that goes to the core of the employer-employee relationship, the information is ''presumptively relevant.'' *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). When the information is presumptively relevant, the employer has the burden of providing the lack of relevance, *Prudential Insurance Co. v. NLRB*, 412 F.2d 77 (2d Cir. 1969). ''[B]ut where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower . . . and relevance is required to be somewhat more precise . . . . The obligation is not unlimited. Thus where the information is plainly irrelevant to any dispute there is no duty to provide it.'' *Ohio Power Co*., 216 NLRB 987, 991 (1975), enfd. mem. 532 F.2d 1381 (6th Cir. 1976); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). When the requested information deals with matters outside the bargaining unit, the union must establish the relevancy and necessity of its request for information. *Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

In a case when the employer, party to a collective-bargaining agreement, appears to be operating another company that might be so interrelated as to constitute a single employer or alter ego, the union party to that agreement is entitled to information from the employer about the nature of and relationship between the two operations that may be relevant and useful to the union representing the employees in negotiating terms and conditions of employment with the employer, or administering and enforcing the collective-bargaining agreement. See, e.g., *Walter N. Yoder & Sons*, 270 NLRB 652 (1984), enfd. 754 F.2d 532 (4th Cir. 1985); *Associated General Contractors of California*, 242 NLRB 881 (1981); *Leonard B. Herbert, Jr. & Co*., 259 NLRB 881 (1981). The Union must demonstrate reasonable or probable relevance whenever the requested information ostensibly relates to employees outside the represented bargaining unit even though the information may show ultimately that the employees are part of the bargaining unit because of existence of a single employer or an alter ego relationship. *Walter N. Yoder & Sons*, supra at fn. 5.

The request by the Union was based on reports it received, including matters set out in documents published by the Respondent itself that the Respondent's news division was expanding and that its news operations would in effect operate under one umbrella. The Union had reports of transfers of newspersons in its unit to the facilities involved here and took cognizance of the Respondent's apparent goal to integrate the operations of those facilities with its New York operations by the use of ''sign off'' language and of similar logos. The evidence also reveals that the Respondent effectively indicated to the Union at one point that its parent, General Electric Company, was responsible for the decision not to recognize the Union as representative of the newspersons at NBC News Channel. The Union also had expressed concern as to moneys possibly due unit employees for the use of their stories on CNBC, NBC News Channel, and on Nightside.

Clearly, the General Counsel has made out a prima facie showing that the Union's request had relevance to its obligations as the bargaining representative of staff and nonstaff newspersons in the Respondent's employ.

The Respondent seeks to rebut that showing by pointing to contract language and an award issued in favor of Columbia Broadcasting System. It argues therefrom that NBC News Channel cannot be found to be a domestic network news bureau and that I must find that CNBC, as it is located across the river from the Respondent's headquarters, is beyond the unit scope. The record before me does not allow for a finding, as a matter of law, that the Union's request has no relevance to the Union's responsibilities as bargaining representative. Rather, the contentions of the Respondent are more properly matters to be presented in any arbitration proceeding that might ensue.

I find that the General Counsel has adduced substantial evidence that established that the Union has good reason to inquire into the arrangements the Respondent has with General Electric, CNBC, NBC Newschannel, and Nightside. The Union had sufficiently objective grounds supporting its request and the data it sought is clearly relevant, and of use, in carrying out its bargaining responsibilities. See *Duquesne Light Co.*, 306 NLRB 1042, 1044 (1992); *Lamar Outdoor Advertising*, 257 NLRB 90, 92–94 (1981).

The Respondent's reliance on bargaining history to show that the request is irrelevant carries little weight. That history shows that the Union has not waived any contractual claim it might have to represent employees of CNBC, NBC Newschannel, or Nightside as the evidence thereon is hardly

clear and unmistakable. In that respect, see *Resorts International Hotel Casino*, 307 NLRB 1437, 1439 (1992). The Respondent's contentions, as to the import of the provisions contained in the staff and code contracts, as to industry practice and as to bargaining history are matters that may be put to an arbitrator but the evidence thereon is insufficient to relieve it of its duty to furnish the requested information. On that aspect, see *Leach Corp.*, 312 NLRB 990, 996 (1993); *Consolidated Coal Co.*, 307 NLRB 69, 72 (1992).

2. Whether the request is unduly burdensome

The Respondent also resists the Union's demand on the ground that, as it views the request as not made in good faith, it did not consider it an appropriate use of its resources to secure the answers the Union asked for.

The Respondent did not, in its answer, offer that defense. At the hearing, its director of labor relations testified that it would take her small staff considerable time to get the material asked for. In that regard, she testified that, in responding to a union request in late 1991 on another matter, she and her staff spent over 40 hours to compile a response.

Respondent cannot now avoid its obligation to furnish the requested data by asserting, for the first time at the hearing, that the task involved is too burdensome. The evidence is that it, on other matters, had produced voluminous data without incident when requested to do so by the Union during contract negotiations. There is no basis in the record to deny the Union's request now. Cf. *Tower Books*, 273 NLRB 671 (1984); cf. also *Consolidated Coal Co.*, 310 NLRB 6, 8 (1993).

The Respondent also asserts that it has given the Union sufficient data in response to its request. That assertion and its contention that the request is too burdensome are patent afterthoughts[3] and are without merit.

The Respondent had given the Union some piecemeal responses. That is inadequate. A complete response to each of the items sought on October 2, 1992, is needed.

I find that the Respondent, by having failed to respond to the Union's October 2, 1992 request for relevant data, has not fulfilled its obligation to bargain collectively with the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act by having failed to respond to the Union's request for information necessary and relevant to its obligations to represent the employees of the Respondent in the respective units in which it is their exclusive collective-bargaining agent.

On the above findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, National Broadcasting Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to honor requests by the American Federation of Television and Radio Artists, AFL–CIO (the Union) for information necessary and relevant to the Union's performance of its responsibilities in representing employees of the Respondent for purposes of collective bargaining.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union all information requested by it on October 2, 1992.

(b) Post at its facility in New York City, copies of the attached notice marked ''Appendix.[5] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] In its posthearing brief, the Respondent, for the first time, contended that this case should be referred to the arbitral process. That contention is untimely. See *Gratiot Community Hospital*, 312 NLRB 1075 fn. 1 (1993).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''